Docket: 2003-1337(EI)

BETWEEN:

KANATA BALLET SCHOOL LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CAROLE ANNE PICCININ,
VIVIAN MELSNESS,
LESLIE JAEGGIN,

Intervenors.

Appeal heard on common evidence with the appeal of *Kanata Ballet School Ltd.* (2003-1340(CPP)) on November 6, 2003, at Ottawa, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Agent for the Appellant:	Marcia Caple
Counsel for the Respondent:	Joanna Hill
For the Intervenors:	The Intervenors themselves

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is allowed and the December 6, 2000 decision of the Minister in respect of the five workers Vivian Melsness, Chris Devlin, Deborah Lamothe, Carole Piccinin and Leslie Jaeggin is vacated.

Signed at Ottawa, Canada, this 26th day of November 2003.

"Lucie Lamarre"

Lamarre, J.

Docket: 2003-1340(CPP)

BETWEEN:

KANATA BALLET SCHOOL LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CAROLE ANNE PICCININ,
VIVIAN MELSNESS,
LESLIE JAEGGIN,

Intervenors.

Appeal heard on common evidence with the appeal of *Kanata Ballet School Ltd.* (2003-1337(EI)) on November 6, 2003, at Ottawa, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Agent for the Appellant:	Marcia Caple
Counsel for the Respondent:	Joanna Hill
For the Intervenors.	The Intervenors themselves

JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is allowed and the December 6, 2000 decision of the Minister in respect of the five workers Vivian Melsness, Chris Devlin, Deborah Lamothe, Carole Piccinin and Leslie Jaeggin is vacated.

Signed at Ottawa, Canada, this 26th day of November 2003.

"Lucie Lamarre"

Lamarre, J.

Citation: 2003TCC870
Date: 20031126
Docket: 2003-1337(EI)
2003-1340(CPP)

BETWEEN:

KANATA BALLET SCHOOL LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

and

CAROLE ANNE PICCININ,
VIVIAN MELSNESS,
LESLIE JAEGGIN,

Intervenors.

REASONS FOR JUDGMENT

Lamarre, J.

[1] This is an appeal from a decision by the Minister of National Revenue ("Minister") that during the years 1998 and 1999 five individuals, namely Vivian Melsness, Chris Devlin, Deborah Lamothe, Carole Anne Piccinin and Leslie Jaeggin, were employed in insurable and pensionable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* ("*Act*") and paragraph 6(1)(*a*) of the *Canada Pension Plan* ("*Plan*").

[2] At the hearing, counsel for the respondent conceded that Chris Devlin and Deborah Lamothe were not employed in insurable and pensionable employment during the years in question. It therefore remains to decide the issue in the case of the other three workers ("Workers").

[3] The evidence disclosed that the appellant is a business involved in teaching ballet, jazz, tap, modern and other dance styles. The appellant hired different dance teachers who were entered on its payroll and treated as employees. With respect to the Workers, all three were experienced professional dancers. They were hired by the appellant to provide dance lessons in their various fields of competence. They were contacted by the principals of the appellant prior to the school year. The dance lessons were scheduled by the appellant according to the availability of the Workers. They verbally agreed on an hourly rate for a set number of hours. Instead of invoicing the appellant, the Workers recorded their hours worked for the appellant in a logbook in which all the teachers, and also the other employees, recorded their hours of work. It happened from time to time that the Workers had to reschedule their classes. It was up to them to find a replacement teacher at their own expense if they could not reschedule a class or make up the hours by extending the duration of other classes.

[4] For the regular classes, the students were registered through the appellant, which received the student fees. The appellant then paid the Workers for the set number of hours worked, no matter how many students were registered in the classes. There was however a maximum of 12 students per class and the regular classes could be cancelled if there were not enough students registered. On the other hand, the Workers could contract directly with the students for private lessons or deal with them directly for the purpose of organizing competitions or registering the students for examinations. The appellant made direct arrangements with the students for regular classes only.

[5] During the years at issue, the Workers all considered themselves as free-lance professional dance teachers. They worked for many other organizations and even for the appellant's direct competitors; they were not bound to work exclusively for the appellant. The appellant paid a rental fee to the City of Ottawa for the use of dance studios. The Workers used those studios at no cost when teaching for the appellant. Otherwise, the Workers provided all their equipment, such as their apparel, special shoes, books and an extensive collection of CDs. The Workers would also pay all expenses for attending different events (such as competitions or festivals) with the appellant's students, and were reimbursed directly by the students. They did not need the appellant's approval to register the students for such events or for various exams.

[6] The question of how to determine whether a person is an employee or an independent contractor was analysed at length by the Supreme Court of Canada in

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983. Major J. concluded as follows in paragraphs 47 and 48:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[7] In my view, when one applies the relevant factors set out by the Supreme Court of Canada to the characterization of the relationship between the appellant and the Workers as resulting from either a contract of service or a contract for services, the overall evidence tends to point in both directions. As for the control test, there was a form of control by the appellant in that the Workers recorded their hours worked. However, the Workers had complete discretion to teach according to their own syllabus. They could register students for competitions or exams without the approval of the appellant. They could reschedule their classes if necessary or find replacements for themselves at their own expense.

[8] With respect to ownership of the tools, the appellant provided the premises for the classes but the Workers provided all other equipment and their expertise in their particular field.

[9] With respect to the chance of profit and risk of loss, the Workers were paid for the hours they worked, no matter how many students were registered in the class. However, they were hired on a contract basis for a fixed number of hours only, set their own remuneration rate and also worked elsewhere. They had no job security nor did they receive any benefits or vacation pay from the appellant. The Workers had to pay for training courses to maintain their standing with dance organizations, while the evidence disclosed that training for teachers who were considered as employees of the appellant was apparently paid for by the latter. The

employees were also entitled to vacation pay and their expenses were reimbursed by the appellant, while that was not the case for the Workers.

[10] As mentioned above, for the purposes of resolving the present issue, the central question, as defined by Major J. in *671122 Ontario Ltd.*, *supra*, is whether the person who was engaged to perform the services was performing them as a person in business on his own account.

[11] Noël J.A. said in *Wolf v. The Queen*, 2002 DTC 6853 (F.C.A.), at paragraphs 122 and 124:

> [122] . . . where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.
>
> [124] This is not a case where the parties labelled their relationship in a certain way with a view of achieving a tax benefit. No sham or window dressing of any sort is suggested. It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding (Compare *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 at 170).

[12] In the present case, it is clear from the evidence that the appellant and the Workers considered the Workers to be involved in an independent contractor relationship. I am also satisfied that the Workers acted in a manner that was consistent with such a relationship, and that this is not a case where the parties labelled their relationship in a certain way with a view to achieving a tax benefit. No sham or window dressing of any sort was suggested either.

[13] I therefore conclude that the Workers performed their services for the appellant as persons in business on their own account. Consequently, during the years 1998 and 1999, they were not employed by the appellant in insurable and pensionable employment within the meaning of paragraph 5(1)(*a*) of the *Act* and paragraph 6(1)(*a*) of the *Plan*.

[14] The appeal is therefore allowed.

Signed at Ottawa, Canada, this 26th day of November 2003.

"Lucie Lamarre"

Lamarre, J.

CITATION:	2003TCC870
COURT FILE NO.:	2003-1337(EI) and 2003-1340(CPP)
STYLE OF CAUSE:	Kanata Ballet School Ltd. v. M.N.R. and Carole Anne Piccinin, Vivian Melsness and Leslie Jaeggin
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 6, 2003
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	November 26, 2003

APPEARANCES:

Agent for the Appellant:	Marcia Caple
Counsel for the Respondent:	Joanna Hill
For the Intervenors:	The Intervenors themselves

COUNSEL OF RECORD:

For the Appellant:

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Firm:

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